No. 8295

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of the Application of
GAVIN W. CRAIG
For a Writ of Habeas Corpus.

Gavin W. Craig,
Appellant.

vs.

United States of America,
Appellee.

OPENING BRIEF OF APPELLANT.

JOHN P. BEALL,
E. T. McGANN,
GAVIN MORSE CRAIG.
904 Broadway Arcade Bldg., Los Angeles,
Attorneys for Appellant

GAVIN W. CRAIG,
In Propria Persona.

Parker, Stone & Baird Co., Law Printers. Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

STATUTES.

TEXT BOOKS.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of the Application of
GAVIN W. CRAIG
For a Writ of Habeas Corpus.

Gavin W. Craig,
Appellant.

vs.

United States of America,
Appellee.

OPENING BRIEF OF APPELLANT.

Statement of Facts and Pleadings Which Form Basis of Jurisdiction.

Appellant was tried and convicted in the United States District Court for the Southern District of California, Central Division, upon an indictment in said court charging a violation of Title 18, U. S. C. A., section 88, being Indictment No. 12237-H. [Tr. p. 21.]

Judgment was pronounced by the court by which appellant was sentenced to serve one year in a county jail.

Commitment was issued thereon and appellant was taken into custody.

While in custody under said commitment, appellant petitioned said District Court for a writ of *habeas corpus* [Tr. p. 3] which was denied. [Tr. p. 36.] Said District Court's jurisdiction to entertain said petition and issue a writ of *habeas corpus* is found in 28 U. S. C. A., Sec. 451.

Appellant duly and regularly filed with said District Court his petition for appeal [Tr. p. 37] which was allowed by said court. Said petition was accompanied by an assignment of errors [Tr. p. 38] which was duly filed.

This court has jurisdiction upon appeal to review the order of the District Court denying said petition. (28 U. S. C. A. 463.)

Statement of the Case.

This appeal is from an order of the above named United States District Court refusing to issue a writ of habeas corpus. It appears from the petition and the exhibits attached thereto that an indictment, No. 12231-C in said court, and which will be referred to as the "former indictment", was duly returned therein; that this indictment named petitioner and others and charged them with conspiracy to obstruct the due administration of justice; that it consisted of two counts, each charging said offense. Trial under said indictment was had, beginning February 25th, 1935, and after both sides had rested the court rendered judgment as follows: "Or rather, instead of dismissing, judgment for the defendants on count one." As to the other count, the jury disagreed.

Thereafter another indictment, referred to herein as the "last indictment," was returned in said court, being No.

12237-H therein; that the first count thereof attempted to charge the same persons accused in the former indictment with the same offense as had been charged in count one of said former indictment and with conspiracy to endeavor to obstruct the due administration of justice; and that said last named count one charges the same and no other offense as did count one of the former indictment; that before trial under the last indictment petitioner duly interposed a plea in bar averring that by reason of the aforesaid judgment he had been acquitted of each offense attempted to be set forth in said count one of said last indictment. This plea was ordered stricken.

Thereafter a trial was had and the jury returned a verdict of guilty against petitioner; judgment was pronounced by the court by which petitioner was sentenced to serve one year in a county jail; commitment was issued thereon and petitioner was taken into custody and was in custody under said commitment when application was made for said writ of habeas corpus.

The last indictment is attached to the petition as Exhibit D. It attempts to allege the substantive offense which the defendants conspired to commit to be, corruptly influencing "the persons acting for and on behalf of the United States in an official function, under and by authority of the laws of the United States and before whom, in their official capacity, said question, matter, cause and proceeding was pending." The matter pending is named as a case referred to herein as "the Italo Case," which it is averred was pending in the said United States District Court.

The former indictment contained similar language except that it named "the persons" as Samuel McNabb and William B. Mitchell, and averred that these persons were United States District Attorney for said district and Attorney General of the United States, respectively. The former indictment is attached to the petition as Exhibit A.

Also there is attached to the petition a copy of all of the testimony introduced by the Government upon both trials (Ex. C) and a copy of the judgment rendered by the court in the former trial. (Ex. F.)

Attention is called to a stipulation entered into by the United States attorney and petitioner [Tr. p. 43] whereby it is stipulated that Exhibit C may be omitted from the transcript on appeal and that the statement of evidence contained in the transcript in case No. 7862 in this court, entitled Gavin W. Craig v. U. S. may be referred to at the hearing on this appeal.

Questions Presented on Appeal.

From the record, the following questions are presented:

1. Did the petitioner have a right to the issuance of the writ as prayed.

2. Is petitioner being illegally restrained of his liberty under said judgment of conviction based on the last indictment.

3. Is said judgment of conviction void because the last indictment:

(a) Charges no offense against the United States.

(b) Violates petitioner's rights guaranteed by the fifth amendment to the Constitution, in that it does not protect him from being placed twice in jeopardy for the same offense, and that it does not provide due process; and that it also violates petitioner's right, guaranteed by the sixth amendment to the Constitution in that it does not inform the defendants of the nature of the charge against them.

4. Did the judgment rendered in the former trial acquit the defendants then on trial under the former indictment.

5. Does the last indictment attempt to charge the same and no other offense than that named in the former indictment.

6. Did the former indictment charge an offense against the United States.

7. Is said judgment of conviction void because the last indictment:

(a) Charges no offense against the United States in that said last indictment alleges no facts which show that the accused entered into a complete and unconditional agreement to commit the substantive offense therein attempted to be charged.

(b) Said last named indictment nowhere avers that the accused agreed to promise, offer to give, or to procure to be offered, promised or given anything to anyone, or to do or promise to do, anything for anyone to secure the dismissal of the Italo case.

Specification of Errors Relied Upon

Petitioner relies upon each of the following assignments of error [Tr. p. 38]:

1. That the court erred in denying the petition for a writ of *habeas corpus*.

2. That the court erred in holding that it had no jurisdiction to issue a writ of *habeas corpus* as prayed for in the petition.

3. That the court erred in not holding that the allegations contained in the petition for a writ of *habeas corpus* were sufficient in law to justify the granting and issuing of a writ of *habeas corpus* as prayed for in the petition.

Preliminary Questions.

Ordinarily we do not anticipate objections which may or may not be raised by opposing counsel, and we will not do so in *extenso* here. However it appears appropriate to remove any question that might arise as to the right of petitioner to be heard on this appeal upon the grounds upon which we rely and which we shall urge for reversal of the judgment refusing to issue the writ of habeas corpus.

This proceeding constitutes a collateral attack upon the judgment of conviction. The preliminary questions which might arise are: 1. May the judgment of conviction be attacked collaterally; and 2. Is the judgment of conviction or the judgment of this court affirming the judgment of conviction *res adjudicata* of the issues presented in the

instant petition? The answer to these questions is found in the following principles:

(1) It is settled law that a judgment of conviction may be collaterally attacked upon the ground that it is void; we believe it to be equally well settled that this may be done in any case where such judgment is relied upon either by way of estoppel or as *res adjudicata;* and especially may such judgment be attacked collaterally through a petition for a writ of habeas corpus.

(2) When a judgment is subject to collateral attack its force is so far destroyed that a question which the court considered in reaching its conclusion can no longer be deemed *res adjudicata.*

(3) The judgment of an appellate court affirming a void judgment is itself void.

(4) Upon collateral attack where it is asserted that the judgment is void, inquiry is made *de novo* concerning all issues and facts upon which its validity rests.

Therefore, in this habeas corpus proceeding the judgment of conviction being attacked as void for want of jurisdiction of the court to render it, the inquiry must include all grounds which we shall argue which may be decisive of that issue, whether presented to this court on the former appeal from the judgment or not so presented.

However, it is certain that the two grounds upon which we principally rely herein were not presented or considered by the court or determined by the judgment affirming the judgment of conviction. Hence, for this further reason, the rule of *res adjudicata* cannot apply to them or bar their consideration.

Two Principal Grounds New.

The first of these two grounds, briefly stated, is that the indictment fails to set forth any facts to identify or particularize either the official functions or the official capacities or the persons whom it is attempted to be charged that the accused conspired to corruptly influence to bring about the dismissal of the Italo case; that such facts constitute an essential ingredient of the offense attempted to be charged. Hence, that the indictment charges no offense against the United States and is wholly insufficient for any purpose.

Upon the former appeal from the judgment of conviction this defect was not presented to this court. The opinion of this court does not mention it. Neither the specification of error in the bill of exceptions, nor the assignments of error in appellant's brief mention it. Such specifications and assignments and the opinion all deal with two other grounds upon which the sufficiency of the indictment was questioned. The first of these was the insufficiency of the charge of one of the elements of the offense attempted to be set forth in the indictment, namely, that of the conspiring of the accused. It was contended that although facts constituting this element were set forth, they were pleaded by inference only, and that this form of pleading was insufficient. This court held that the indictment was good as against this criticism.

By appropriate assignments of error (Ex. C p. 732) it was also urged that the indictment did not charge an unconditional and complete conspiracy, but only an incoate and conditional agreement between the alleged conspirators. This court held that the indictment was also good as against this attack.

The second ground upon which petitioner asks to be discharged in this proceeding and which was not presented or decided in the appeal from the judgment of conviction, is that this petitioner was acquitted of the offense charged in the indictment appealed from and for which he is now restrained of his liberty, by a judgment in a former trial of petitioner for the same offense.

Neither by the assignment nor by the specifications of error on the appeal from the judgment of conviction was this issue presented, nor is it mentioned in the opinion of this court affirming said judgment. The issue was presented to this court at that time that the action of the Government's attorney in attempting to dismiss count one of the former indictment constituted an acquittal. This court held that such action was a *nolle prosequi,* and as such did not bar a further prosecution of the same offense.

In this collateral attack upon the judgment of conviction petitioner has argued and will insist here that the court during the former trial rendered judgment for this petitioner and acquitted him of the same offense as that of which he was convicted, and that therefore the judgment of conviction is void.

Res Adjudicata Inapplicable.

We believe it to be settled law and incontrovertible that, as stated in 15 R. C. L. 840, "When a judgment can be collaterally attacked its force is so far destroyed that a question which the Court considered in reaching its conclusion can no longer be deemed *res adjudicata.*" Again we quote from 15 R. C. L. 895, where it is said: "Yet it is equally well settled that such judgments (those of courts of general jurisdiction) may be collaterally attacked when a want of jurisdiction affirmatively appears from an inspection of the *record.*" (Citing many cases.) The lack of jurisdiction is apparent from the record in the instant case.

In 15 R. C. L. 896 it is emphasized that if want of jurisdiction affirmatively appears from the *record* the estoppel of *res adjudicata* does not exist, and cases are cited.

In *Freeman on Judgments,* 5th Edition, page 643, it is said: "A judgment void upon its face and requiring only an inspection of the record to demonstrate its invalidity is a mere nullity, in legal effect no judgment at all, it neither binds nor bars anyone." Citing authority. And on page 3172 similar statements are made.

It follows that since the lack of jurisdiction appears on the face of the instant indictment and of the judgment of acquittal, and of the indictment upon which it was rendered this judgment of conviction is not *res adjudicata* in this proceeding. And this coincides with the rule that where a judgment is void it can be attacked collaterally, and where it can be attacked collaterally a judgment is not an estoppel as *res adjudicata.*

At this point, and to clear away any possible objection to a consideration of the merits of this appeal on the theory that the judgment of conviction can be regarded as *res adjudicata* as to any issues to be presented, only a few cases will be cited which hold that the petitioner must be discharged through *habeas corpus* where it appears that he is restrained of his liberty after conviction under an indictment which is void for failure to state an offense against the United States.

First to be mentioned is one of this Circuit, *Mackay v. Miller,* 126 Fed. 161. The statute under which the defendant was prosecuted was one "to prevent smuggling." It inhibits resisting "any officer of the customs or his deputies." The indictment charged the accused with resisting an Indian agent who was making a search on the reservation for spirituous liquors. It was held that the indictment charged no offense. After final conviction, sentence, and imprisonment the accused was released on *habeas corpus.* As to the right to *habeas corpus,* the court said:

> "But the doctrine is well established that upon a writ of *habeas corpus,* if it appears that the court which rendered the judgment had not jurisdiction to render it, either because the proceedings under which they were taken are unconstitutional, or for any other reason the judgment is void, and may be questioned collaterally, and the person who is imprisoned thereunder may be discharged from custody on *habeas corpus.*"

This case has never been overruled, either in this Circuit or by the United States Supreme Court. It cites among other cases *In re Siebold,* 100 U. S. 371, and *Nielson v. U. S.,* 131 U. S. 176.

See, also:

In re Greene, 52 Fed. 104, and

Kansas etc. v. Morgan, 76 Fed. 429.

In *Aderhold v. Schiltz,* 73 Fed. (2d) 381, the indictment charged "attempt to rob" a postal clerk. The statute made it an offense to "assault with intent to rob" any person having the custody of any mail matter. After judgment of conviction it was held that the indictment did not charge an offense against the United States, and hence, that the petitioner was entitled to release on *habeas corpus.*

Indeed, in each of the proceedings which will be cited and many of them quoted from, later in this brief, in which petitioners have been discharged on *habeas corpus,* a final judgment of some court was collaterally attacked. In nearly all of them the judgment was attacked for lack of jurisdiction because the indictment did not state some essential ingredient of the offense attempted to be charged, although in many instances it did allege such ingredient in generic language. In practically all of these proceedings the final judgment was rendered by a court of general jurisdiction, federal or state; in some it had been affirmed by a federal appellate court and in others by a state appellate court. In connection with cases of the last mentioned class, it is a basic principle of the doctrine of *res adjudicata* that it is applicable equally to judgments of all courts, regardless of degree or jurisdiction, including those rendered by a justice of the peace. (15 *Cal. Jur.* 107.)

Also contained in this record is the judgment of acquittal to which we have referred. This judgment was ren-

dered by Hon. Jeremiah Neterer during the former trial of petitioner for identically the same offense of which he was convicted and for which he is now imprisoned. [Tr. p. 34.] In so far as the possible preliminary objections which are being discussed at this point in our brief are concerned, all that has been said as to our right to attack the judgment of conviction collaterally on the ground that the indictment is void and that the court has no jurisdiction is equally applicable here; this is true as well as to the other grounds relied upon and issues raised by the instant petition, for each ground set forth questions the jurisdiction of the court to render the judgment.

Appellate Court Judgment Void Which Affirms Void Judgment.

Finally, before entering upon the argument of the grounds upon which this appeal is taken, attention is called to the law which is settled to the effect that a judgment of an appellate court which affirms a void judgment is itself void. This proposition may be so obvious as not to require the citation of authority. However, among those which may be cited is *Ball v. Tolman,* 135 Cal. 375. In the original case in which judgment had become final, judgment for the plaintiff was entered January 9, 1897, and an appeal was taken. In the meantime the penal clause in the statute on which the judgment was grounded was repealed. However, on appeal the judgment was affirmed. Thereafter, defendant's attorneys made a motion for stay of execution. This was denied. Execution was levied and the lands sold. A motion was made to vacate and set aside the sheriff's sale and for an order staying all proceedings on said judgment. This was denied, and another appeal taken.

It was contended that the judgment of the Supreme Court affirming the lower court's judgment was with jurisdiction and that the former judgment was *res adjudicata* and ended the matter. The Supreme Court, however, held that it had no jurisdiction to affirm the void judgment of the Superior Court. It quotes from *Freeman on Void Judicial Sales,* Sec. 2, and from *Freeman on Executions,* Sec. 16, Note 2. Also from *Pioneer etc. Co. v. Maddux,* 109 Cal. 633, which held that the affirmance of a void judgment is itself void, saying that while the facts in the last named case were different the principle decided was that where the trial court lacks jurisdiction to render a judgment, its affirmance by an appellate court cannot impart validity to it. Also in *Freeman's Work on Judgments,* last edition, page 643, it is said, "the fact that a void judgment has been affirmed on review in an appellate court * * * adds nothing to its validity."

Indictment Failing to Identify and Describe Substantive Offense Is Void.

As briefly as may be we will now present the merits of this petition for the discharge of the petitioner herein on *habeas corpus* and the grounds for reversal of the judgment of the trial court refusing to issue the writ.

The petition specifically sets forth four grounds. It asserts [Tr. p. 8] that the judgment of conviction of petitioner under the commitment by which he is now imprisoned is void for want of jurisdiction of the court to render it; that such judgment is void because the indictment from which it must derive its life, if life it has, is void,—it is dead, it is wholly insufficient for any pur-

pose. This is so because it sets forth no facts sufficient to constitute any offense against the United States. This failure to charge an offense results from the fact that it contains no averment of any fact concerning an essential ingredient of the offense attempted to be stated, to-wit, the identification and particularization of the official funtion, the official capacity and the person of any of the "persons" whom the indictment charges the petitioner conspired with others to corruptly influence to bring about the dismissal of a case known as the "Italo case." It does not *at all* identify the substantive offense which it is alleged the accused conspired to commit.

It is further insisted that by reason of this particular substantial defect in the indictment, the petitioner's rights, guaranteed by the Constitution of the United States were violated. His right not to be placed twice in jeopardy for the same offense; his right to due process, and his right to be informed of the nature of the charge against him were each violated.

We contend that when an indictment is thus defective and violates any one of these constitutional rights a judgment based upon it is void, and the defendant, being imprisoned by virtue of such judgment is entitled, as a matter of right, to be discharged through a writ of *habeas corpus*. This is settled law according to the decisions of the United States Supreme Court and of the Federal Courts, which will be cited and excerpts from a number of them quoted.

The count of the indictment here in question has attempted to charge the accused with conspiracy to endeavor to obstruct the due administration of justice in a case which for brevity we will refer to as "the Italo case," then pending in the United States District Court. It is charged that the accused conspired to corruptly influence "the persons acting for and on behalf of the United States in an official function, and under and by authority of the laws of the United States and before whom, in their official capacity, said question, matter, cause and proceeding was pending, and to do acts," etc.

In almost identical words this language is repeated several times in the charge, but nowhere does the indictment set forth a single fact to identify any of the "persons" whom it alleges the accused conspired to corruptly influence; nowhere does it set forth a single fact to identify or particularize the "official functions" of any such persons or the "official capacity" of any of these "persons." Nowhere does it identify the substantive offense which it is charged the accused conspired to commit. This is not a case of an indictment pleading facts indirectly and inferentially, and hence, arguable as to whether or not the defendants were sufficiently informed of the nature of the charge, and as to the possibility of it affording them protection against double jeopardy, and providing due process. This indictment does not set forth *any* facts to comply with the provisions of the Constitution, which guarantees each of these rights to every person accused of an offense against the United States.

Identification of Substantive Offense Is an Essential Ingredient.

That the identification and particularization of those persons conspired to be influenced and of their official functions or of their official capacities is, in itself, an essential ingredient of the offense here attempted to be charged, is obvious and it is also well established law. Without it the substantive offense is wholly unidentified. It will be seen that in each of the cases which will now be cited the indictment attempted to charge the same offense as does the instant indictment, or one of precisely the same class.

Kellerman v. U. S., 295 Fed. 796, establishes every legal principle necessary to entitle this petitioner to the relief sought, except as that case is not a proceeding in *habeas corpus,* it does not rule upon his right to this particular remedy. However, elsewhere we have a wealth of authority as to that right. This case does hold that the language used in this indictment and which we have quoted is generic only; that it is therefore the mere conclusion of the pleader; that it is wholly insufficient; that it violates the defendant's constitutional rights to be protected by the indictment from double jeopardy, and to be informed of the nature of the charge against him, and it does declare that the particular element of an offense not distinguishable in principle from that which we are now discussing is an essential ingredient of such an offense, without the pleading of which the indictment states no offense. The statute on which the indictment in that case was based denounces bribery of "any officer of the United States" or of "any person acting for or on behalf of the United States in any official function." The first count described the offense, as to this element, in this

generic language of the statute, only; this was held to be wholly insufficient, quoting *U. S. v. Cruickshank,* 92 U. S. 542, and other leading cases which declare that to charge this essential ingredient, *facts* and not mere conclusions of the pleader must be set forth. In the *Kellerman* case the indictment named the person whom it was charged the accused attempted to bribe, but it was held that this was not enough; that "the office or the official function of the one to whom the bribe was offered, as a person within the class described in the statute, are *facts* which must be alleged *in the indictment,*" and "that this omission is a defect in *substance* and is not cured by verdict or plea of guilty." (Italics ours.)

By way of contrast, in *Krishman v. U. S.,* 256 U. S. 992, we have an example of an indictment properly drawn, as far as setting forth this particular ingredient is concerned. The indictment named the person, and also named his official capacity and function. Krishman was thus enabled to appeal from a denial of a motion in arrest of judgment and to secure a reversal because the indictment showed that the officer alleged to have been corrupted had no official function which placed him within the class of persons described in the statute.

In *Taffe v. U. S.,* 86 Fed. 113, the indictment was drawn under R. S. 5440. The indictment charged the defendants with conspiracy to "corruptly endeavor to influence a petit jury of the United States," using the mere language of the statute. It was held to state no offense, and that to prosecute the defendants under it would violate both the 5th and 6th amendments to the Constitution. The opinion points out that to charge an offense similar in nature to that here attempted to be

charged, an allegation of the *identity* and *official functions* and *official capacity* of the person whom it is charged the accused conspired to corruptly influence, is an essential and a vital ingredient. Having declared that the use of the above quoted generic language was wholly insufficient, it is said that count one thus contained no averment in particularity of the individuals on the jury to be corrupted, by which the defendants might be apprised of the case so as to meet it, thus violating the 5th amendment. As to count two it was said, "the same lack of pleading *facts* exists," and especially, "nor does it appear who comprised the jury, nor what jurors were intended to be influenced." The *Taffe* decision is further worthy of note because the charge was conspiracy. It this eliminates any issue about less particularity being required where the charge is conspiracy than where it is of the substantive offense.

In *Anderson v. U. S.*, 260 U. S. 557, it is said:

> "As the conspiracy is the gist of the offense, it is undobtedly true that the offense which it charged the defendants conspired to commit need not be stated with that particularity that would be required in an indictment charging the offense itself. Still, as was said in Williamson v. U. S., 207 U. S. 447, 'the offense which the defendants conspired to commit must be identified.' "

Other conspiracy cases to the same effect are *U. S. v. Cruickshank, supra; Brenner v. U. S.*, 237 Fed. 636; *Conrad v. U. S.*, 127 Fed. 798; *McKenna v. U. S.*, 127 Fed. 88.

We apprehend that no decision will be found where an indictment has been sustained in which there was an entire

lack of pleading facts in specie to set forth an essential ingredient. It is only where some facts are pleaded, and the issue is whether they are sufficient to inform the accused of the nature of the charge, that the courts have said that less particularity will suffice in charging conspiracy than in alleging the substantive offense.

The instant indictment names no one whom it is charged the accused intended to influence; it fails to name the function of any such person, or the official capacity of any such person. There is no attempt to individualize this charge so that the defendants would, through it, have protection against being again placed in jeopardy for the same offense. It gives absolutely no information which would inform the defendants as to any fact whatsoever upon which the grand jury made the charge that the defendants conspired to influence anyone on earth. The *Taffe* decision declares that such an indictment charges no offense and is wholly insufficient.

Milner v. U. S., 36 Fed. 890, squarely determines that in charging the offense of conspiracy to obstruct the due administration of justice, to particularize in identifying the person conspired to be corruptly influenced, and his official function or capacity, is an essential ingredient, without which the indictment states no offense. The charge as to this element was that the accused conspired to influence "the officers of the United States acting under the authority of the United States, for the Southern Division of the Northern District of Alabama, and before whom said suits were pending," by means of tendering and agreeing to give said officers sums of money. It was held that this "is a description too indefinite to identify either the agreement or tender, and to inform the defend-

ant of the nature of the charge against him." And again referring to the agreement, it is said: "It is not charged as written or oral, active or passive, and is left uncertain as to matter and persons; all of which is of more importance, as the grand jury seems to have been fully advised of all the facts relating to the alleged act."

It is obvious that "the persons" referred to in the language quoted above from the instant indictment might be of the Attorney General's office, or of the judiciary, or of any one of a number of divisions of the Department of Justice. Were the defendants to be prosecuted by another indictment in which some member of one of these branches of the Government were named and his official function specified or his office named, of course a plea of former jeopardy would be futile. This indictment would furnish no protection. And how could the defendants know how to prepare a defense against such a generic charge. They are presumed to be innocent. They can have no basis to suppose that the evidence which the Government proposes to produce will identify any particular person rather than any other of the classes before whom it might be said that the *Italo* case was pending, involving probably thousands of persons. But the reasons for holding as the *Kellerman, Taffe, Milner, Pettibone, Van Wert* and *Cruickshank* decisions are better stated than we could hope to express them. This is especially true of the *Cruickshank* decision which may well be said to be a classic.

Other decisions to which we refer on this are *Waugh v. Aderhold,* 52 Fed. (2d) 702; *White v. Levine,* 40 Fed. (2d) 502; *McKenna v. U. S.,* 127 Fed. 88; *Johnson v. U. S.,* 294 Fed. 753; and *Keck v. U. S.,* 174 U. S. 434.

In each of these cases the respective indictments were held to be void and not capable of conferring jurisdiction, because lacking an essential ingredient of the offense attempted to be charged, which was either pleaded in the generic words of a generically worded statute, or as to which there was no pleading at all. In each case the lacking ingredient is analogous to that which is not set forth here.

The *Keck* decision is especially illuminating. It is by the Supreme Court, 172 U. S. 434. The charge was illegal importation.

It is said that where as was the case there, the statute only describes the general nature of the offense prohibited, and the indictment repeats the averments in the language of the statute, no facts are alleged and the indictment states no offense, and no issues to submit to the jury. This was held to be true of the first count.

The same issue was raised in somewhat different form as to the second count; the statute prohibited "fraudulently or knowingly importing or bringing into the United States any merchandise." It was held that this was generic language and really meant to denounce smuggling. The opinion points out that smuggling may be accomplished under the statute in any one of many ways, and since the indictment did not state facts, as distinguished from the generic conclusions sufficient to constitute any of the different ways by which the offense might be committed, the indictment was insufficient to state an offense.

Likewise here, obstructing the due administration of justice may be accomplished in many ways. This use of the generic language alleges no facts constituting any one

of them. The dismissal of the *Italo* case might have been accomplished by bribing the judge; or by using political influence on the department of justice, or some member of it; inducing him to suppress evidence; it might be by paying the local United States district attorney money to bring about the dismissal; many ways indeed might be suggested.

The defendants were not informed by this charge as to which of these ways it was contended by the Government that the accused had conspired to bring this result about.

As pointed out in the *Keck* decision, too, the purpose, that of bringing merchandise into the United States was not unlawful in itself. It could become unlawful only if the means to be employed were unlawful. In such cases the *Keck* opinion declares the means must be set out with the utmost particularity.

Here, the dismissal of a case is not unlawful; it becomes so only when corrupt means are employed.

In *Pettibone v. U. S.,* 147 U. S. 197, where the charge was conspiracy to obstruct the due administration of justice, we find this pertinent language: "The official character that creates the offense and the scienter is necessary." The official character referred to is that of the officer or court upon whom the attempt to obstruct justice in a particular case is conspired to be made.

The test commonly used to determine whether an element of an offense is an essential ingredient of it or merely part of the description, pertaining to mere uncer-

tainty and lack of precision and therefore a matter of form only, and not pertaining to the substance of the offense is: If the element was omitted from the indictment altogether would it still state an offense? Applied to this indictment the asking of the question is its own answer. If this generic language, "the persons acting for and on behalf of the United States in an official function," etc., were omitted from the indictment, of course no offense would be stated. Or suppose the indictment had averred that the accused conspired to influence corruptly "someone," and stopped there as to that element, would an offense have been set forth? Surely no one would contend that it would. Why? Because it is no offense to influence, no matter how corruptly, the action or the decision of anyone about a cause or matter with which that person has nothing to do. The "someone" must be a person acting for and on behalf of the United States in an official function under or by authority of some department or office of the Government of the United States. But while it must be shown that he is someone having such a function and official authority, it is the settled law as declared in the *Kellerman* case, that since these terms are general, to merely employ them in the averment of the ingredient which is thus essential, amounts to nothing more than the statement of the bald conclusions of the pleader, and is as though nothing had been said on the subject or as though it had stopped with averring that the accused conspired to induce someone to dismiss the *Italo* case.

This Language Is Merely Generic.

The language of which complaint is here made is the generic language of the statutes under which the instant indictment was drawn. (18 U. S. C. A., 88, 91 and 241.) The generic character of the words employed will hardly be disputed. However, since in numerous cases they have been so held, several decisions so deciding will be mentioned. These unhesitatingly and without the citation of authority decide that language almost identical with that used in this indictment is generic. Such decisions are *Kellerman v. U. S.; U. S. v. Taffe,* and *Milner v. U. S.,* all *supra.*

U. S. v. Van Wert, 195 Fed. 974, is another case directly decisive of this matter. The offense charged was of the same general character as the one attempted to be charged in the instant indictment. It was under section 17 of the Penal Code which reads: "Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity under and by virtue of the authority of any department or office of the Government thereof" shall accept a bribe "with intent to have his decision on any matter, question, cause or proceeding pending * * * before him in his official capacity * * * shall be fined," etc. It was held that this language is generic, and that that part of the indictment which used it was entirely insufficient to charge an offense because there was no allegation as to what official duty of defendant was conspired to be influenced; and this was held to be essential.

If an Essential Ingredient Is Lacking No Offense Is Charged.

With the thesis securely established that to particularize the substantive offense is an essential ingredient of the charge of conspiracy to endeavor to obstruct the due administration of justice and also that the language of the instant indictment is generic only, and the mere quoted language of a generically worded statute, we proceed to place before the court the authorities which show it to be settled law that an indictment whose charge omits to set forth *facts* constituting an essential ingredient of the offense attempted to be charged, states *no offense* against the United States; and further that the use of generic language, only, to state such an essential ingredient, *amounts to nothing.* It cannot be considered in lieu of the necessary allegation of facts. The logic leading to these conclusions is clear and the authorities are numerous and positive. We venture the assertion that there are no decisions holding to the contrary.

Many decisions refer to *U. S. v. Cruickshank,* 92 U. S. 542. There, the statute made it unlawful to conspire with intent to hinder a citizen in the free enjoyment of *any* right or privilege granted by the Constitution. Two fatal defects were held to exist in the indictment. They were lack of averment of the specific intent required and failure to specify *what* rights were conspired to be hindered. The last named element was charged only in the generic language of the law. The court declares:

> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall

charge the offense in the same generic terms as in the definition, but it must state the species,—it must descend to particulars. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.

"All crimes are not so punishable. Whether a particular crime be such a one or not, is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, etc. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offense alleged."

The analogy of this clear exposition of the well established law to the instant indictment is plain. Substitute "persons" for "rights" and it is complete. Just as the statute which was involved in the *Cruickshank* case made

criminal a "combination with an intent to prevent the enjoyment of *any right* granted or secured by the Constitution" so the statute under which the present indictment was drawn makes criminal a combination with the object to corruptly influence the decision and action of *any persons* acting on behalf of the United States in an official function, etc. And, as all rights are not secured by the Constitution and therefore it was a question of law to be decided by the court whether one is so or not, here also, all persons are not acting on behalf of the United States in an official function, etc., and it was a question of law *for the court* whether the particular ones alleged to be conspired to be influenced were such. It is not a question "to be decided by the prosecutor". Therefore, the names of the "persons" and their official functions or official capacities become an essential ingredient of the offense, which can not be supplied by quoting the generic language of the statute only, and without which, no offense against the United States is stated.

In *Collins v. U. S.,* 253 Fed. 609, decided in this Ninth Circuit, it is held that an indictment which pleads an essential ingredient of the offense attempted to be charged in the generic language only, *states no offense known to the law.* It is said that such pleading constitutes nothing more than "the sheerest conclusion". To the same effect are *U. S. v. Green,* 136 Fed. 618; *Martin v. U. S.,* 168 Fed. 198; *Floren v. U. S.,* 186 Fed. 96; *Shaw v. U. S.,* 292 Fed. 339; *Grimsby v. U. S.,* 50 Fed. (2d) 509; *Pettibone v. U. S.,* 147 U. S. 197; *Boykin v. U. S.,* 11 Fed. (2d) 484; *U. S. v. Taffe,* 86 Fed. 115; and *Eckert v. U. S., 7* Fed. (2d) 257.

Another case from the Ninth Circuit, *Foster v. U. S.,* 253 Fed. 481, declares that such generic pleading of an essential element sets forth only the mere conclusions of the pleader and renders the indictment a *nullity* and "dead". See also *Hess v. U. S.,* 153 U. S. 587.

Another often quoted authority friom this circuit is *U. S. v. Armstrong,* 59 Fed. 568. The charge, as in the instant indictment, was conspiracy to obstruct the due administration of justice. Citing the *Cruickshank, Carll* and other leading decisions, it was held that the indictment was fatally defective, because only generic words had been employed.

In all of the cases cited under this heading, the theory upon which the conclusion is reached that the mere use of generic language to charge an essential ingredient is a nullity and wholly insufficient to confer jurisdiction, is, that the indictment must allege *facts,* not mere conclusions of the pleader; that generic language constitutes the "sheerest conclusions" only. Hence that where generic language *only* is used to charge an essential ingredient, there is an *utter lack of any pleading* of that ingredient, and of course, it results that *no offense whatever is charged.*

An indictment which fails to set forth facts to charge any essential ingredient of the offense attempted to be charged is *void* for any purpose; this defect is one of substance and not merely of form. It goes to the very life of the charge. The following decisions so hold:

Blitz v. U. S., 153 U. S. 306; *Carll v. U. S., supra; U. S. v. Ford,* 34 Fed. 26; *Reimer-Cross v. U. S.,* 20 Fed. (2d) 36; *Jarl v. U. S., supra; U. S. v. Green, supra.* In each of these cases generic language of the statute was used and also some facts were set forth from which it was argued that the lacking ingredient was sufficiently pleaded. But the courts held to the contrary and condemned the indictments as wholly insufficient.

A Ninth Circuit case, *Salla v. U. S.,* 104 Fed. 544, also declares that where an essential ingredient is pleaded in generic language only, the indictment fails to state an offense against the United States.

Where the indictment fails to state an essential ingredient of the offense, the court lacks jurisdiction over the subject matter. *U. S. v. Rogoff,* 163 Fed. 311, was a case in which an indictment was returned attempting to charge perjury in a bankruptcy proceeding. After the jury was impanelled but before any evidence was taken the action was dismissed on the ground that the indictment failed to show facts sufficient to constitute a crime, in that there was no allegation that the bankruptcy proceeding was pending in any court of the United States. After the dismissal the court directed a verdict for the defendant. A second indictment was then returned charging the same offense. In denying defendant's plea of double jeopardy the court held that the first indictment was a nullity and insufficient to charge a crime, and hence, insufficient to place the accused in jeopardy. It was pointed out that while the court had jurisdiction of the person *it did not have jurisdiction over the subject matter of the offense attempted to be charged, because no offense was charged.*

Indictment Is Void If Constitutional Rights Violated; Habeas Corpus Proper Remedy.

But it is not merely the fact that the indictment under which the petitioner herein was convicted fails to state an offense against the United States which entitles him to be discharged on *habeas corpus*. For other and perhaps more vital and cogent reasons this same defect in the indictment gives him a constitutional right to such discharge. It may be more accurate to say that the fundamental reasons back of the rule that makes void an indictment which omits an essential ingredient or avers it in generic language only, is that the constitutional rights of the accused are thereby violated.

Approaching the issue with this thought in mind, reference is again made to the *Cruickshank* case. Indeed, the petitioner herein might well rest on this decision alone. It points out that without something more than a charge in generic terms, the constitutional right of the accused to be informed of the nature of the charge against him is violated; and that it again violates the guaranty that no one shall be twice placed in jeopardy for the same offense. Other cases point out that for a defendant to be forced to trial on an indictment thus defective is subversive of the inhibition of the 5th amendment against prosecution without due process of law.

Several cases stress the point that an indictment of this character does not protect against double jeopardy. It must be remembered that, as declared in *Bens v. U. S.*, 226 Fed. 152, and *Nielsen v. U. S., supra,* the constitutional inhibition against double jeopardy begins back of the judgment and back of the trial. It begins with the charge of the offense itself. In *Jarl v. U. S., supra,* it is

said that one of the purposes of the indictment is "to identify the charge so that the defendant may not be put on trial for an offense other than the one covered in the indictment; to enable him to prepare his defense; and to protect him on the record in his constitutional right from being twice *put in jeopardy* for the same offense."

The following additional authorities assert the law to be that where the indictment charges any essential element of the offense in generic language only, it will not protect the accused against a violation of the guaranty against double jeopardy, and that such an indictment is therefore wholly insufficient: *U. S. v. Hess, supra; Ledbetter v. U. S.,* 170 U. S. 610; *Evans v. U. S.,* 124 U. S. 487; *Keck v. U. S., supra; Anderson v. U. S.,* 260 Fed. 557; and *Kellerman v. U. S., supra.* The same exposition of the law is found in *Reimer-Cross v. U. S.* and *Jarl v. U. S.,* both *supra.*

If the indictment does not inform the accused of the nature of the charge against him it is a nullity; he may attack it collaterally and be freed. This follows for the same reasons just discussed in connection with one which fails to protect the accused against double jeopardy. The *Cruickshank* case includes this reason, among others, for holding the indictment wholly insufficient. Nearly all of the cases cited under the last heading do the same, including *Hess, Foster, Carll, Floren, Kellerman, Pettibone, Taffe,* and *Evans* cases; also *Grimsley v. U. S.,* 50 Fed. (2d) 509; *Peters v. U. S.,* 94 Fed. 127; *U. S. v. Dowling,* 278 Fed. 730; and *Boykin v. U. S.,* 11 Fed. (2d) 484.

In each of these indictments the insufficiency or the ground of attack was the pleading of some essential ingredient in the generic words of the statute. From *Boykin v. U. S., supra,* we quote:

> "Where a statute is general, it is not sufficient merely to follow its language in an indictment, but the indictment must allege the specific offense coming under the general description of the statute, in order that the accused may enjoy the right, secured by the Sixth amendment, 'to be informed of the nature and cause of the accusation against him.' "

Similar language is found in the *Collins* and *Foster* cases, both of which are from the Ninth Circuit. This principle has been affirmed by the United States Supreme Court in a number of decisions, among which is *Simmons v. U. S.,* 94 U. S. 360.

If Indictment States No Offense Petitioner Is Entitled to Habeas Corpus.

In the preceding presentation of the preliminary question of the right of petitioner to be heard by the District Court and to attack the judgment of this court collaterally, the decisions rendered in a number of *habeas corpus* proceedings were cited to the point then being presented. It is now in order to refer to those cases and others as authority that petitioner is entitled to be discharged for the reason that the indictment charges no offense against the United States and that the judgment is void upon that and the constitutional grounds which have been set forth.

Attention is first called to the fact that *habeas corpus* is a writ of right. It has been so held in *Bens v. U. S.,* 266 Fed. 152; *Stevens v. McLaughrey,* 207 Fed. 544; R. S. 755.

One who is deprived of his liberty under a judgment which denies him a constitutional right is entitled to be discharged on *habeas corpus.* (*In re Siebold,* 100 U. S. 371; *Nielsen v. U. S.,* 131 U. S. 176; *Munn v. Barber,* 136 Fed. 313; *Mackay v. Miller,* 126 Fed. 161; and *Colson v. Aderhold,* 5 Fed. Supp. 111.)

Directly to the point, if an indictment is so defective that it will not protect the accused against the violation of guaranty in the fifth amendment against double jeopardy, a writ of *habeas corpus* is a proper remedy to which he is entitled as a right. (See *Bens v. U. S., Stevens v. McClaughry,* and *Nielsen v. U. S., supra; Sprague v. Aderhold,* 45 Fed. (2d) 790.) In this last case it is said that *habeas corpus* cannot be used to correct mere error but that

> "It is believed, however, that no court has refused to inquire, on *habeas corpus,* whether one is really being punished twice for the same offense, although clearly, former jeopardy if it occurred in the previous trial, and, if in the same trial, may and ought to be urged before sentence, and inquired into by the trial court."

An indictment which charges any essential ingredient of the offense attempted to be averred in generic language only, will not protect the accused against violation of the guaranty against double jeopardy. (*Cruickshank, Hess, Ledbetter, Evans, Keck,* and *Anderson* cases, all *supra.*)

It has been shown to the point of demonstration, that the instant indictment pleads the essential element of the identity of the offense which it charges the accused conspired to commit in the generic language only. Also, by the authorities last cited and others heretofore cited and quoted from on page 27 herein, that when the charge is in such generic words only it charges no public offense and does not protect the accused against double jeopardy. Hence, it follows that he has a right to be discharged through this *habeas corpus* proceeding.

Where any essential ingredient of the offense is set forth only in the generic language with no pleading in specie of facts as to such element, it fails to inform the defendant of the nature of the charge against him as provided by the sixth amendment. (See *Cruickshank, Keck, Floren, Ford,* and *Armstrong* cases, all *supra.*)

Where the rights of the petitioner which are guaranteed by the sixth amendment, to be informed of the nature of the charge against him are violated he is entitled to discharge on *habeas corpus.* (*Mackay v. Miller,* 126 Fed. 161; *Manning v. Biddle,* 14 Fed. (2d) 518; *Waugh v. Aderhold,* 52 Fed. (2d) 702; *Aderhold v. Schlitz,* 73 Fed. (2d) 381.) These cases also hold that if the indictment charges no offense known to the law *habeas corpus* is a proper remedy, and on page 28 *et seq.* of this brief we have shown that an indictment which pleads any essential ingredient of the offense attempted to be charged in generic language only, it charges no offense against the

United States. Hence, in the instant proceeding, the petitioner is entitled to be discharged on *habeas corpus*.

The indictment under which this petitioner was convicted charged the accused with conspiracy. The charge was that the accused conspired to commit the substantive offense of endeavoring to obstruct the due administration of justice; it was averred that they conspired to do this by corruptly bringing about the dismissal of the *Italo* case by influencing the action of "the persons acting for and on behalf of the United States in an official function, and under the authority of the United States, and before whom in their official capacity, said criminal proceeding was pending."

The substantive offense is not otherwise described or identified. No facts are pleaded. No official is named as one whom the accused conspired to influence; neither the official function of any such official nor his official capacity is stated. The name of no such official is mentioned. The language is wholly and typically generic. The indictment charges no offense against the United States. It did not guarantee the accused against further jeopardy for the offense attempted to be charged. It did not inform him at all as to the nature of the charge. It did not provide him with due process. It is void, "dead", "wholly insufficient for any purpose". It provides "no issue on which the case could be submitted to the jury". It is a "nullity" and it cannot confer jurisdiction. A judgment based upon it is void and affords no justification for a commitment or the imprisonment of the defendant, this petitioner.

Former Acquittal of Charge Entitles Petitioner to Release.

This petition alleges that previous to his trial and conviction of the offense for which he is now imprisoned he was acquitted by a judgment of the United States District Court whose language was "Or rather, instead of dismissing, judgment for the defendants on count one.", which judgment was duly entered by the clerk. (Ex. F.)

Any judgment whose legal effect is an acquittal is a bar to further prosecution for the same offense as *res adjudicata.* (*U. S. v. Oppenheimer,* 242 U. S. 309; *U. S. v. Myerson,* 24 Fed. (2d) 855; *U. S. v. Morse,* 24 Fed. (2d) 1001; and *Coffey v. U. S.,* 116 U. S. 436.)

The import of a judgment is to be determined by its words. In the absence of fraud extrinsic proof is not admissible to explain it. (*Lyon v. Pettin, etc. Co.,* 125 U. S. 698; *Louis v. Wabash R. Co.,* 152 Fed. 849; *Long v. Long,* 44 S. W. 341 (Mo.).)

A judgment, duly and regularly made, which is not void for want of jurisdiction, even though irregular, cannot be attacked collaterally. (*Ex Parte Roe,* 234 U. S. 70; *U. S. v. Rothstein,* 187 Fed. 268; *Manson v. Duncanson,* 166 U. S. 533; *Kansas v. Morgan,* 76 Fed. 429.)

Such a judgment is *res adjudicata* as to all issues directly decided by it as between the United States and Gavin W. Craig, in any suit for the same or for any other cause. (*Southern Pac. Co. v. U. S.,* 168 U. S. 1.)

Each of the foregoing propositions are elementary and settled law. Put together and applied to the facts as shown by the record we see no escape from the conclusion that petitioner has been acquitted of the identical offense

for which he is now imprisoned, under a judgment which must be void.

It surely will not be disputed that the District Court had jurisdiction to acquit the defendants. It had jurisdiction of the persons of the defendants and of the subject matter of the offense charged in the indictment. Unlike the indictment under which this petitioner was later convicted and imprisoned, this indictment stated a public offense. It named the persons whom it charged the accused conspired to corrupt; it specified their official capacities. It set forth that these persons were Samuel McNabb, and William B. Mitchell, United States District Attorney for the Southern District of California, and Attorney General of the United States, respectively.

It cannot be denied that the court had plenary power to acquit the defendants either by dismissing count one of the indictment of its own motion after they had been placed in jeopardy or to have directed the jury to acquit. It chose to use the method of rendering judgment for the defendants.

The Government might have appealed from this judgment, had it doubted its validity. There are other appropriate means of attacking it directly. It cannot do so collaterally, except on the ground that it is void or was obtained by fraud, and obviously neither of these grounds is available.

The two indictments here involved themselves evidence that the first charges, and the second attempts to charge, the same offense. If more is needed the testimony of the Government's witnesses, set forth in Exhibit C, page 230, attached to the petition, shows beyond the possibility of questioning that identically the same offense was prose-

cuted in both cases. We have no reason to believe that the identity of the charges will be disputed by the Government.

To complete the demonstration that petitioner is entitled, as a matter of right, to have this writ issued and to be discharged from custody, it remains only to cite a few decisions of the Supreme and Federal Courts. We believe that there is no legal proposition more universally accepted and everywhere unquestioned than that a prisoner is entitled to release on *habeas corpus* where it appears that he had been acquitted of the offense for which he is held in custody.

In *Nielsen v. U. S.*, 131 U. S. 176, the petitioner was discharged on *habeas corpus* because it appeared that he had been convicted of the same offense for the commission of which he was imprisoned. It is declared that if the fact of double conviction for the same offense "appears in the indictment or anywhere else in the record" it is sufficient. And again, that a party is entitled to *habeas corpus* not merely where the court is without jurisdiction or power to condemn the defendant; that the rule "*in favorem libertatis*" should prevail, and "If we have seemed to hold the contrary in any case, it has been from inadvertence."

In *Bens v. U. S.*, 266 Fed. 152, it was alleged in the petition that the petitioner had been previously acquitted of the offense for which he was in custody. In the opinion it is said

> "if he is twice put in jeopardy, if he is put upon trial a second time for an offense of which he has been once acquitted or convicted; there is no power in any court to try him the second time, and a sec-

ond judgment would be, not merely erroneous, but absolutely void. If the petitioner herein is being held for a crime of which he has already been acquitted, the court below is without power either to punish him again or to try him again for that offense; and in such a case he has a right through the writ of *habeas corpus* to obtain his discharge, if the two offenses are the same."

Halligan v. Wayne, 179 Fed. 112 (9th Cir.). Petitioner, having pleaded guilty to four counts of the same indictment served sentence under the first count. He was then released on *habeas corpus* because it was held that since but one offense was charged in the indictment the sentences under the last three counts were void. Upon similar grounds prisoners were released in the following cases: *In re Snow,* 120 U. S. 274; *Colson v. U. S.,* 5 Fed. Supp. 111; *Ex Parte Lagomarsino,* 13 Fed. Supp. 947; *Bertsch v. Snook,* 36 Fed. 2d) 155. In all of these cases the release was based upon the proposition as stated in *Ballerini v. Aderholt,* 44 Fed. (2d) 352, that "under the fifth amendment one may not for the same offense be twice put in jeopardy."

As held in these cases, this petitioner having been acquitted of the offense charged in the indictment under which he stands convicted, no court had power to try him again for that offense, much less to sentence him for it.

Whether the court's lack of power is merely to sentence, or is jurisdiction of the subject matter of the offense, "or for any other reason", *habeas corpus* will discharge the priosoner. (*Mackay v. Miller,* 126 Fed. 161 (9th Cir.).)

But surely the law is too well settled on this issue to need further authority.

Allegation Concerning Agreement to Influence Officials Insufficient.

The last indictment avers no facts showing that the petitioner agreed to pay or to offer to pay anyone anything or to use any other means to bring about the dismissal of the *Italo* case. In generic terms only this allegation is attempted to be made. The mere reading of the language is sufficient to satisfy one that it is generic and that no facts whatsoever are set forth in that behalf. The authorities which we have cited heretofore, especially the *Taffe* and *Milner* cases, are applicable here.

The Indictment Charges Only an Inchoate and Conditional Agreement Between the Alleged Conspirators.

We rest our argument concerning this ground upon the language of the indictment and the opinion of the Hon. James A. Fee in passing upon a former indictment of the same persons indicted under the instant indictment and for the same offense. In so far as this issue is concerned the two indictments are not distinguishable. We are assured that the authorities cited in Judge Fee's opinion fully sustain his holding that the indictment failed to state a public offense, because the facts set forth showed no completed agreement to do anything; that the negotiations averred never reached the stage of a completed conspiracy, and hence did not violate the statutes of the United States.

The Fee opinion reads as follows:

> "The gist of the crime of conspiracy is the unlawful agreement to commit an offense against the United States. Acts which tend to accomplish the object but which are performed prior to the forma-

tion of the conspiracy are of no value. Morrow v. U. S., 11 Fed. (2d) 256; U. S. v. Grodson, 164 Fed. 157; Minner v. U. S., 57 Fed. (2d) 506, 511. Conferences at which the conspiracy was formed and acts done for the purpose of arriving at a concert of action belong to the period of formation. Dahly v. U. S., 50 Fed. (2d) 37, 42. Furthermore, acts done in order to obtain the adherence of a particular person to the plan belong to the embryonic stage, since defendants must be definitely committed to co-operate for the accomplishment of the object or no conspiracy exists. See U. S. v. Mundy, 186 Fed. 375, 377. In an indictment for this crime facts must be positively set forth, therefore, which establish that the stage of negotiation had passed, and which body forth the full fledged conspiracy into unconditional adhesion of each defendant thereto.

Tested by these principles Count One of the instant indictment is fatally defective. It is alleged that the defendants 'were in consideration of the payment to them of a large sum of money, to-wit, fifty thousand dollars, to promise, offer and give' money to the officials in charge of a certain prosecution. This statement avers that the adherence of the defendants to the scheme of bribing the officials was to be obtained by the *payment* of a large sum of money *to them.* The bargaining for their adherence was an essential part of the formulation of the conspiracy. *Ex parte* Black, 147 Fed. 832, 838. This money was not paid to the defendants, and under the allegations of this indictment none of them therefore engaged definitely to offer money to the officials and none became members of the conspiracy.

A similar indictment was upheld in Felder v. U. S., 9 Fed. (2d) 872, but this particular point was not present. If the indictment in that case be taken as a whole, it will be found the allegations show that the defendants each received more than the sum alleged as a consideration for their co-operation. Thus the price was paid and the adherence of each of the defendants secured to the conspiracy, and the promise of each to offer money to the officials was in effect. Beyond this, the appellate court reviewing that case had before it proof of an unconditional agreement by defendants to carry out the object of the conspiracy and proof of the receipt of large sums of money in consideration for their agreement to bribe officials. In view of the verdict of guilty by a jury on these facts the conditional manner of statement of the promise might well have been disregarded, since the indictment and proof showed the condition so stated had been fulfilled.

But the error in the instant case had been made in attempting to adapt that indictment to a different state of facts without either discarding the language there used as inapplicable to the facts here or showing the fulfillment of the condition on the face of the indictment. Here two of the defendants, according to the allegations, received no money, and the third only minor sums. There is thus no definite statement that defendants agreed to offer money to the officials to influence their conduct. It is alleged they conspired to commit 'divers offenses'. But that is a conclusion. U. S. v. Eisenminger, 16 Fed. (2d) 816, 817; U. S. v. Dowling, 278 Fed. 630, 631. The clause beginning with 'according' might appropriately have been used to set out the means of accomplishing an unlawful purpose. It may be that this defect

is an inaccuracy only in the method of stating the facts. However, the face of the indictment must control, and it does not say that any definite agreement was entered by defendants nor that any of them unconditionally adhere to the conspiracy. Asgill v. U. S., 60 Fed. (2d) 780."

Conclusion.

It has been shown conclusively that the judgment of conviction is void, because the indictment fails to state any offense against the United States and violates petitioner's constitutional rights.

It appears from the record presented that petitioner was previously acquitted of the offense for which he is now in prison; hence he is entitled as a matter of right to release on a petition for a writ of *habeas corpus* and it is respectfully submitted that the order of the District Court denying said petition be reversed.

JOHN P. BEALE,
E. T. McGANN,
GAVIN MORSE CRAIG,
Attorneys for Appellant.

GAVIN W. CRAIG,
In Propria Personam.